152U.S.499

RECORD, CASE No. 14,320.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM No., 281

ROBERT P. MACLAY, TUTOR OF THE MINOR, MASON SNOWDEN, PLAINTIFF IN ERROR,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED OCTOBER 17, 1890.

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a UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

R. P. MACLAY, Tutor, etc., Plaintiff in Error,
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Defendant in Error. } No. 11801.

Chas. Carroll and F. L. Richardson, Esquires, for plaintiff in error; W. D. Denegre and Henry C. Miller, Esquires, for defendant in error.

Writ of error returnable to the Supreme Court of the United States of America, at the city of Washington, D. C., on the second Monday of October, A. D. 1890.

Transcript of Record.

1 Circuit Court of the United States, Eastern District of Louisiana.

R. P. MACLAY, Tutor,
vs.
EQUITABLE LIFE ASSURANCE SOCIETY. } No. 11801.

Transcript of Record from the Civil District Court. Filed April 7th, 1889.

Proceedings in the civil district court.

STATE OF LOUISIANA,
Parish of Orleans, City of New Orleans.

Civil District Court for the Parish of Orleans.

R. P. MACLAY, Tutor,
vs.
EQUITABLE LIFE ASSURANCE SOCIETY. } No. 26181. Division "E."

Petition. Filed February 12, '89.

To the honorable the civil district court for the parish of Orleans:

2 The petition of Robert P. Maclay, a resident of the parish of Pointe Coupée, with respect represents—

That on the 5th day of April, 1888, he was appointed tutor of Mason Snowden, a minor child, the sole issue of Samuel H. Snowden and Mary Louisa McGehee, both deceased, and late residents of the State of Louisiana, as will more fully appear by a reference to a certified copy of his letters of tutorship, hereto annexed and made part hereof, marked Exhibit "A."

That the Equitable Life Assurance Society of the United States, domiciled in the city and State of New York and also in the city of

New Orleans, State of Louisiana, and represented in said city by Alfred A. Woods as their agent, is justly and truly indebted unto your petitioner, as tutor of said minor, Mason Snowden, in and to the full sum of ten thousand dollars and the tontine dividends hereafter set forth, with legal interest, for this, to wit, viz: On or about the 6th day of July, 1870, said Equitable Life Assurance Society insured the life of the late Samuel H. Snowden for said sum of $10,000 for and in consideration of the sum of $67.70, then paid to them by Mary L. McGehee Snowden, and thereafter a like sum, to be paid in October, January, April, and July of each year during the natural life of said Snowden, in favor of said Mrs. Mary L. Gehee Snowden, wife of said Snowden, if living at the time of his death, and if not living, to the children of said Samuel H. Snowden or their guardian; all of which will more fully appear by reference to a copy of said policy of insurance furnished to petitioner by said society, hereto annexed and marked Exhibit "B."

That the original of said policy is now in the possession of
3 the said assurance society.

That on the 3rd day of August, 1883, said Mrs. Mary L. McGehee Snowden, wife of said S. H. Snowden and mother of said minor, Mason Snowden, died, and thereafter said minor, Mason Snowden, became the beneficiary of said insurance contract.

That on the 9th day of March, 1888, said Samuel H. Snowden, the insured and father of said minor child, died.

That petitioner thereupon notified said assurance society of the death of said Snowden and offered to make proof of his death, and required and demanded payment of said sum of $10,000, but payment was refused; that said society denied their liability and claimed that they had acquired all the rights of said minor in and to the said policy as beneficiary thereof by purchase thereof from said assured, Snowden, at same date during the month of August, 1886, for and in consideration of the sum of $3,173.40 to him paid.

Now, petitioner avers that such pretended acquisition of said minor's rights was null and void and was without authority of law; that said policy was issued under the tontine dividend plan, and the tontine dividend period for said policy, under the contract set forth in said policy, had been completed on the first day of June, 1886, and after that date there was a dividend to which the beneficiary was entitled, and after that period said policy had a cash-surrender value.

That on the 1st day of August and until the quarter ending on the 5th day of October, 1886, the premiums on said policy had been paid, and thereafter would have been paid had not said society so, as above set forth, illegally acquired possession thereof and prevented all further payments by claiming to be the owners
4 thereof.

Petitioner avers that said minor was at that time a resident of this State and was not represented by a tutor, and had there been a tutor no sale could have been made of his property without legal authority and without complying with the requirements of the laws of this State in reference to the property of minors.

Petitioner avers that the rights vested in said minor child under said policy, and which had accrued by the completion of said tontine dividend period at and before said sale, could not be divested by said unauthorized and illegal acts, and said minor, herein represented by petitioner, is entitled to payment of the full amount of said sum of $10,000, with all tontine dividends and other profits accrued thereon and interest, less any premiums which may be found to be due, but which could not be paid because of said illegal acts.

Wherefore petitioner prays that said Equitable Life Assurance Society of the United States be cited to appear, through its proper officer or lawful agent; that, after due proceedings had, judgment be rendered in his favor for the full sum of ten thousand dollars, with accrued dividends, less any amounts which may be due for premiums, with legal interest from judicial demand until paid, for all costs, and for general relief.

(Signed) CHARLES CARROLL.
F. L. RICHARDSON, *Of Counsel.*

Feb. 12th, 1889.

EXHIBIT MARKED "A" (Being a Certified Copy of Letters of Tutorship), Annexed to Petition.

THE STATE OF LOUISIANA, }
Parish of Pointe Coupée, }

To all men to whom these presents shall come, Greeting:

Whereas Robert P. Maclay has been duly and legally appointed tutor to the minor Mason Snowden, issue of Samuel H. Snowden and Mary Louisa McGehee, both deceased, and has taken the oath required by law:

Now, these presents are to make it known that the said Robert P. Maclay is authorized and empowered to administer the interest of said minor and to do and perform as tutor to said minor aforesaid and for the interest of the said minor all the duties imposed on him by law.

Witness the Hon. John Yoist, judge of the fifteenth district court, this 5th day of April, 1888.

[SEAL.] (Signed) C. D. HEBERT, *Dy Clerk.*

Filed April 14, '88.
(Signed) H. DIDIER, *Dy Clerk.*

STATE OF LOUISIANA, }
Parish of Pointe Coupée, }

15th Judicial District Court.

I, the undersigned, clerk of court in and for the parish and State aforesaid, do hereby certify that the within is a true copy of the letters of tutorship on file and of record in my office

6 Witness my hand officially and the seal of office this 20th day of May, 1888.

[SEAL.] (Signed) ED. THOMPSON,
Clerk of the 15th Judicial Dist.

STATE OF LOUISIANA, }
Parish of Pointe Coupée, }

I, the undersigned, judge of the 15th judicial district of the State of Louisiana, parish aforesaid, do hereby certify that Edward Thompson, whose signature is attached to the above certificate, is the clerk of the court for the parish of Pointe Coupée, and that his signature is genuine.

Pointe Coupée, May 21st, 1888.

[SEAL.] (Signed) JNO. YOIST,
Judge of the 15th Jud. District.

STATE OF LOUISIANA, }
Parish of Pointe Coupée, }

15th Judicial District Court.

I, the undersigned, clerk of court for the parish aforesaid, do hereby certify that John Yoist, whose name is attached to the above certificate, is the judge of the 15th jud. district of the State of Louisiana, and that his signature is genuine.

Witness my hand officially and seal of office this 21st May, 1888.

[SEAL.] (Signed) ED. THOMPSON,
Clerk of the 15th Judicial District.

7 EXHIBIT MARKED "B," Policy Annexed to Petition.

William C. Alexander, president.

George W. Phillips, actuary; Henry Day, attorney; Edward W. Lambert, M. D., physician; Henry M. Alexander, counsel; Alfred Lambert, M. D., physician; Willard Parker, M. D., consulting physician.

Premium, 867.70. [Vignette.] Amount, $10,000.

The Equitable Life Assurance Society of the United States.

Age, 31. No. 54688.

James W. Alexander, secretary. Henry B. Hyde, vice-president.

In consideration of the representations made to them in the application for this policy, and of the statements respecting the person, and family, of the person, whose life is hereby assured, submitted by or for such person to said society, which application and statements are hereby referred to and made a part of this contract, and of the sum of sixty-seven dollars and seventy cents, to them duly paid by Mary L. McGehee Snowden, wife of Samuel H. Snowden, and of the quarterly premium of sixty-seven dollars and seventy cents, to

be paid on or before the fifth days of October, January, April, and July in every year, during the continuance of this policy: do assure the life of the said Samuel H. Snowden, of New Orleans, in the parish of Orleans, State of Louisiana, for the sole use of the said wife—

8· [1 dollar. U. S. inter. revenue stamp, inland exchange. 1 dollar. C. W. D. June, 1870.]

—in the amount of ten thousand dollars, for the term of his natural life.

And the said society do hereby promise and agree to pay the amount of the said assurance at their office in the city of New York, to the said wife, for her sole use, if living, in conformity with the statute, and, if not living, to the children of said Samuel H. Snowden or their guardian, for their use, or if there be no such children surviving, then to the executors, administrators, or assigns of said Samuel H. Snowden in sixty days after due notice and satisfactory proof of the death, during the continuance of this policy, of the said person whose life is hereby assured as above, the balance of the year's premium, if any, being first deducted therefrom.

This policy is issued and accepted by the assured upon the following express agreements and conditions:

First. If any person, whose life is hereby assured, shall travel or reside or be beyond the settled limits or the protection of the Government of the United States (excepting in the settled limits of the Dominion of Canada); or west of the 109th degree of west longitude (excepting in California and Oregon, with right of passage thither and back by direct overland route); or north of the 50th degree of north latitude; or between the 1st of July and the 1st of November, south of the parallel of 36° 30′ of north latitude (excepting in eastern and middle Tennesse, and those parts of North Carolina, South Carolina, Georgia, and Alabama which lie north of 34° north latitude, and at the same time more than seventy-five miles from the Atlantic ocean); or shall enter upon a voyage upon the high seas (excepting to pass as passenger, by direct route, in first-class vessels, along the coast of the United States, New Brunswick, and Nova Scotia, between Cape Canso and the Rio Grande—provided no port is entered in which residence at the time of such entrance is not herein allowed—or between the Atlantic coast of the United States and those parts of Europe which lie north of 42° north latitude, in which part of Europe travel and residence are permitted), or shall be personally engaged in blasting, mining, submarine or aëronautic operations, or the production of highly inflammable or explosive substances; or in working or managing a steam-engine in any capacity; or as a mariner, engineer, fireman, conductor, express messenger, mail agent, or laborer in any capacity upon service on any sea, sound, inlet, river, lake, or railroad; or shall enter any military or naval service whatsoever (the militia, not in actual service, excepted); without the consent of this society, in each or either of the foregoing cases, previously given in writing; or if he or she shall die by his or her own hand, within two years

from the date hereof, or in, or in consequence of a duel, or the violation of the laws of any nation, State, or province; then, and in every such case, this policy shall be null and void.

Second. That the declaration and statements made in the application for this policy, or otherwise submitted in writing to this society, on the faith of which declaration and statements this policy is issued, are warranted by the assured and by the holder hereof to be in all respects true and without the suppression of any facts relating to the health or circumstances, either of the person whose life is hereby assured, or of his family, affecting the interests of this society, and that the violation of this condition in any respect renders this policy null and void.

Third. If the premiums, as herein stipulated, shall not be paid on or before the days herein mentioned for the payment thereof (allowance being made for the months of grace hereinafter mentioned), at the office of this society, in the city of New York (unless otherwise expressly agreed in writing), or to such agents only as produce receipts signed by the president, secretary, or actuary, then, in every such case, this society shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease and determine.

Fourth. In every case when this policy shall cease and determine, or become or be null and void, all payments thereon shall be forfeited to the society.

Fifth. If this policy should be lawfully assigned or held as security, written notice shall thereupon be given to this society, and due proof of interest produced with the proofs of death.

9 And further, this policy is issued and accepted by the assured upon the following special agreements and conditions, relative to tontine dividend policies:

First. That this policy is issued under the tontine dividend plan, class A.

Second. That the tontine dividend period for this policy shall be completed on the first day of June, in the year eighteen hundred and eighty-six.

Third. That no dividend shall be allowed or paid upon this policy unless the person whose life is hereby assured shall survive until the completion of its tontine dividend period, and unless this policy shall be then in force.

Fourth. That all surplus or profits derived from such policies, in any class on the tontine dividend plan as shall cease to be in force before the completion of their respective tontine dividend periods, shall be apportioned equitably among such policies of the same class as shall complete their tontine dividend periods.

Fifth. That the tontine dividend when made shall be applied only to the purchase of an annuity to reduce premiums during the whole subsequent continuance of this policy; and that the first payment of such annuity shall be due at the commencement of the assurance year of the policy immediately succeeding the year in which the tontine dividend period of this policy shall be completed; provided, that if in any year the amount derived from dividends

on this policy shall exceed the amount of premiums due thereon, the excess shall be paid in cash to said Samuel H. Snowden or assigns.

Sixth. That previous to the completion of its tontine dividend period this policy shall have no surrender value in cash or in a paid-up policy; unless it be in the B or D class, in which classes only the assured, after premiums upon a policy have been duly received by this society for not less than three complete years, shall be entitled to a paid-up policy without profits for the same amount as is allowed by the rules of the society on the surrender of corresponding ordinary policies; provided always, that surrender of the policy, duly receipted by the assured, be made to this society while the policy shall remain in force.

Seventh. That in the payment of premiums upon this policy a grace shall be allowed of as many months (not exceeding six) as shall be equal to the number of complete years during which this policy shall have been in force; provided always that whenever advantage is taken of this grace a fine shall be paid to this society at the rate of ten per cent. per annum for the time deferred.

In witness whereof, the said The Equitable Life Assurance Society of the United States, have by their president and secretary, signed and delivered this contract, this sixth day of July, one thousand eight hundred and seventy.

(Signed) WILLIAM C. ALEXANDER, *President.*

(Signed) JAMES W. ALEXANDER, *Secretary.*

Agents of the society are not authorized to make, alter, or discharge contracts, or waive forfeitures.

For a wife, G, 69, tontine policy.
Examined by —— ——.

Copy of original policy No. 54688.

F. H. FENNING,
Policy Clerk.

This policy will not be binding until delivered by the society's cashier, or by its agent, —— ——, on receipt of the amount of the first payment herein mentioned, due acknowledgment of such receipt being made below by said cashier or agent.

The amount of the first payment herein mentioned, received, and policy delivered by me.

—— ——, *Agent.*

10 *Notice to the Assured.*

Payments of premiums.—This policy, when signed by two officers of the society, acknowledges, and is a valid receipt for the first payment thereon. Renewal premiums may be paid in cash to an agent, but only on the production of a receipt signed by the president, secretary, or actuary, who are alone authorized to sign receipts on the part of the society. No payment made to an agent without

such receipt being given in return by him is considered valid by the society. When receipts are delivered to a policy-holder by an agent, such agent should countersign the same as an evidence of payment to him.

Commencement of assurance year and balance of year's premium.—All calculations of premiums are made upon the supposition that they will be paid annually, in advance; consequently, when premiums are received semi-annually, or quarterly, the policy stipulates (in order to prevent loss to the society by death, before the complete premiums of a year have been paid), that the balance of the year's premium, if any, shall be first deducted from the amount assured. Sometimes, again, for the accommodation of assurants, an irregular premium, covering an irregular period of time, is received, followed by regular periodic payments. In such cases, the assurance year will be understood to commence at the date of the first regular payment, and the balance of the year's premium (when premiums are paid oftener than yearly) will be the amount necessary to continue the policy in force until the next anniversary of the first regular payment.

Powers of agents.—Agents are not authorized to make, alter, or discharge contracts, waive forfeitures, grant permits, name an extra rate of special risks, guarantee dividends, or bind the society in any way; their duties being simply the reception and transmission of applications for policies, and premiums under the rules and instructions of the society.

Alterations of policies.—Changes in the manner of paying premiums (as from yearly to half-yearly, or quarterly, or the reverse) can be made; but when such a change is desired by the policy-holder, the policy must be forwarded to the office of the company for the requisite indorsement.

When a policy is altered at the request of the holder, the revenue stamp required on the new form must be paid for by him, together with a policy fee of one dollar.

A change of interest in a policy can only be made on the written request of the legal owner of the policy, and with the consent of the society.

Assignments.—When a policy is assigned, written notice of such assignment must be given to the society, for registration on its books. All assignments, to be valid, require a revenue stamp equal in value to that on the policy, and the cost of such stamp must be borne by the policy-holder.

Permits and extra rates.—Permits are required for travel or residence beyond the limits assigned in the policy, and for hazardous occupations; for which application must be made to the principal office. Extra rates, in such cases, are always charged as a percentage on the amount assured, and not on the amount of premium. But no extra risk will be covered until the society agree in writing to accept such risk, and until the extra premium, if any, demanded for such risk, is paid.

Proofs of loss.—In the event of the death of a person assured, application should be made to the society for a blank form of "proofs

of death." This form contains affidavits to be made by the attending physician of the deceased, by a friend present at the time of death, by the undertaker having charge of the interment, and by the person to whom the policy is payable. These proofs should be properly filled up and forwarded to the society, and if found satisfactory, payment of the policy will be made by check to the order of the legal holder of the policy, sixty days after the proofs shall have been received by the society, on surrender of the policy duly receipted. Ordinarily, if desired, policies will be discounted as soon as the proofs of death have been approved by the society.

When policies have been assigned, the original assignment must be delivered to the society, with proofs of death. In the case of the death of an owner of a policy terminated by death, a certificate from the proper officer will be required to show who is authorized to act as executor or administrator of such owner deceased. If the policy is payable to minors, a proper certificate of the appointment of the guardian will be required.

[Endorsed:] (Copy.) No. 54688. The Equitable Life Assurance Society of the United States, 120 Broadway, New York. Tontine dividend policy, class "A." Assurance on the life of Samuel H. Snowden. This policy will not draw dividends until the first day of June, 1886. Amount, $10,000. Term, life.

First payment	867 70
Policy	1 00
	868 70

Q. Premium due 5th Oct.–Jan. 867.70, April–July. Register date of policy, 5th July, 1870.

[Endorsed:] No. 26181. C. D. C. Exhibit B. Collect $1.00. 26181. Filed Feb'y 12, '89. Th. Buisson, d'y cl'k.

11 *Citation. Filed February 14th*, 1889.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans, in the City of New Orleans.

R. P. MACLAY, Tutor, &c.,
vs.
EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. } No. 26181.

The Equitable Life Assurance Society of the United States, through its proper officer or lawful agent, New Orleans:

You are hereby summoned to comply with the demand contained in the petition, of which a copy accompanies this citation, or deliver your answer to the same, in the office of the clerk of the civil district court for the parish of Orleans, within ten days after the service hereof.

[SEAL.] Witness the Honorable F. A. Monroe, N. H. Rightor, A. Voorhies, T. W. C. Ellis, F. D. King, judges of the said court, this 12th day of February, in the year of our Lord 1889.

(Signed) TH. BUISSON,
Deputy Clerk.

Sheriff's Return.

Received February 12th, 1889, and on the 13th day of February, 1889, I served a copy of the within citation and accompanying petition on The Equitable Life Assurance Society of the United States, defendant herein, by personal service on A. A. Woods, its agent in this city.

Returned same day.

(Signed) PETER McGRATH, *Dy Sh'ff.*

12 *Petition for Removal to United States Circuit Court. Filed March 12th, 1889.*

R. P. MACLAY, Tutor,
vs.
EQUITABLE LIFE ASSURANCE SOCIETY. } No. 26181. Division "E."

Petition to remove to United States circuit court for the eastern district of Louisiana.

To the honorable judges of the civil district court for the parish of Orleans, State of Louisiana:

Your petitioner, The Equitable Life Assurance Society of the United States, respectfully shows—

That it is the defendant in the above-entitled suit; that the matter in dispute therein exceeds, exclusive of interests and costs, the sum or value of $2,000.00.

That said suit is of a civil nature, being a claim for the insurance which it is alleged is due the plaintiff as tutor of the minor child, Mason Snowden, because of the death of his father, Samuel H. Snowden.

Your petitioner further states that in said above-mentioned suit there is a controversy which is wholly between citizens of different States and which can be fully determined as between them, to wit, a controversy between your said petitioner, who avers that it was at the commencement of this suit and still is a citizen of the State
13 of New York, and the said R. P. Maclay, tutor, who, your petitioner avers, was at the commencement of this suit and still is a citizen of the State of Louisiana, and that both said R. P. Maclay, tutor, and your said petitioner are actually interested in said controversy; and

Your petitioner offers herewith a bond, with good and sufficient surety, for *his* entering in said circuit court of the United States on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by said circuit court if

said court shall hold that this suit was wrongfully or improperly removed thereto.

And *he* prays this court to proceed no further herein except to make an order of removal, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the eastern district of Louisiana.

(Signed) THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
By WALTER D. DENEGRE, *Att'y.*

(Signed) H. C. MILLER, *Of Counsel.*

Affidavit.

STATE OF LOUISIANA, }
Parish of Orleans, } *ss:*

I, Walter D. Denegre, being duly sworn, do say—

That I am the attorney for the petitioner in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein
14 contained are true, as I verily believe.

(Signed) WALTER D. DENEGRE.

Sworn to and subscribed before me this 12th day of March, 1889.

[SEAL.] (Signed) E. A. LUMINAIS, *Clerk.*

Order.

Let the bond filed herewith be accepted and this cause removed to the United States circuit court for the fifth circuit and eastern district of Louisiana, returnable to said court on the first day of its next regular session.

New Orleans, March 12th, 1889.

(Signed) ALBERT VOORHIES, *Judge.*

Bond for Removal to U. S. Circuit Court. Filed March 12th, 1889.

R. P. MACLAY, Tutor,
vs. } No. 26181. Division "E."
EQUITABLE LIFE ASSURANCE SOCIETY. }

Bond for transfer of this cause to the United States circuit court for the eastern district of Louisiana.

Know all men by these presents that *I*, the Equitable Life Assurance Society of the United States, as principal, and A. A.
15 Woods, as surety, are held and firmly bound unto R. P. Maclay, tutor, and all other persons whom it may concern, in the penal sum of $250.00; for payment of which, well and truly to be made, we bind ourselves, our heirs, representatives, and assigns, jointly, severally, and firmly by these presents—

Yet upon these conditions: The said Equitable Life Assurance

Society of the United States having petitioned the civil district court for the parish of Orleans, State of Louisiana, for the removal of a certain case therein pending, wherein The Equitable Life Assurance Society of the United States is defendant and R. P. Maclay, tutor, *os* plaintiff, to the circuit court of the United States in and for the eastern district of Louisiana:

Now, if the said Equitable Life Assurance Society of the United States shall enter in the said circuit court of the United States on the first day of its next session copy of the record in said suit and shall well and truly pay all costs that may be awarded by the said circuit court of the United States if the said court shall hold that the said suit was wrongfully or improperly removed thereto, then this obligation — be void; otherwise in full force and virtue.

Witness our hands and seals this 11th day of March, 1889.

(Signed) EQUITABLE LIFE ASSURANCE SOCIETY OF THE U. S.,
By A. A. WOODS, *Agent.*

(Signed) A. A. WOODS.

Certificate.

STATE OF LOUISIANA:

Civil District Court for the Parish of Orleans.

16 I, Edgar A. Luminais, clerk of the civil district court for the parish of Orleans, do hereby certify that the foregoing twenty-two pages do contain a true, correct, and complete transcript of all the proceedings had, documents filed, testimony and evidence adduced, upon the trial of the cause wherein R. P. Maclay, tutor, is plaintiff and Equitable Life Assurance Society is defendant, instituted in this court and now in the records thereof under the No. 26181.

In testimony whereof I have hereunto set my hand and affixed the impress of the seal of said court, at the city of New Orleans, on this seventeenth day of April, in the year of our Lord one thousand eight hundred and eighty-nine, and in the one hundred and thirteenth year of the Independence of the United States of America.

[SEAL.] (Signed) E. A. LUMINAIS, *Clerk.*

Proceedings in the United States Circuit Court.

Motion to remand. Entered and filed April 24th, 1889.

R. P. MACLAY, Tutor, *vs.* THE EQUITABLE LIFE ASSURANCE SOCIETY. } No. 11801.

17 On motion of Chas. Carroll and E. L. Richardson, of counsel for plaintiff in the above-entitled cause—

It is ordered that defendant do show cause on the 27 day of —— , 1889, at 11 a. m., why this cause should not be remanded to the

civil district court for the parish of Orleans, La., on the following grounds:

1st. Plaintiff and defendant are both residents of the State of Louisiana, and the removal of this cause is not authorized by law, and particularly by the first section of an act of the U. S. Congress entitled An act to determine the jurisdiction of the circuit courts of the United States and regulate the removal of causes from the State courts, and for other purposes, approved March 3rd, 1875, and amended by act of March 3rd, 1887, and corrected by act of the U. S. Congress passed August 13th, 1888.

Second. This cause could not have been originally brought before this court because of want of jurisdiction over the parties thereto, and is not removable to this court under the laws of the United States.

Marshal's Return.

Received Apr. 25, 1889, by the U. S. marshal, and on the 26th day of April, 1889, I served a true copy of the within rule on Walter D. Denegre by handing the same to him in person.

Ret'd Ap'l 26, '89.

(Signed) GEO. MOORMAN,
U. S. Marshal.

18 *Supplemental and Amended Motion to Remand. Entered and Filed May* 18, 1889.

R. P. McCLAY, Tutor,
vs. } No. 11801.
EQUITABLE LIFE ASSURANCE SOCIETY OF THE U. S.

On motion of Charles Carroll and F. L. Richardson, of counsel for plaintiff in the above-entitled cause, and on suggesting—

That they desire to amend the motion herein filed by them on April 25th, 1889, requiring the defendant to show cause why this suit shall not be remanded to the civil district court for the parish of Orleans—

It is ordered that they be permitted to amend said motion so that the causes or grounds on which the plaintiff asks that this case be remanded to said civil district court, instead of being given and set forth as in said original motion, shall be as hereinafter stated, and that defendant show cause on this 18th May, 1889, at 11 o'clock a. m., why this case shall not be remanded to said civil district court on on the following grounds:

1st. That the removal of this cause is not authorized by any law or statute of the United States.

2nd. That the removal of this cause is not authorized by the act of the United States Congress approved 3rd March, 1887, entitled "An act to amend sections one, two, three, and ten of an act to determine the jurisdiction of the circuit courts of the United States

and to regulate the removal of causes from State courts, and
19 for other purposes, approved March 3rd, eighteen hundred and seventy-five," as the same is amended and corrected by the act of said Congress approved 13th August, 1888.

3rd. That this action could not have been brought originally in this court, and consequently cannot lawfully be removed to this honorable court, and therefore should be remanded to the said civil district court.

4th. That the defendant is a corporation of the State of New York, having its main office in said State, and has an agent and attorney in the State of Louisiana, with power and authority to sue and be sued, to carry on business, to contract, to waive forfeitures, make acknowledgments, and do all such acts and things as are done by the corporation in New York; that if by reason of this fact the defendant be an inhabitant and resident of the State of Louisiana, then, since the plaintiff is a resident and citizen of Louisiana, both plaintiff and defendant are residents of the same State, and this honorable court is without jurisdiction in the premises; that if the defendant be an inhabitant and resident of the State of New York, then, under the laws of the United States, this suit could not have been brought in this honorable court originally, nor can it be removed hereto, and that this cause should be remanded to said civil district court.

Hearing and Submission of Motion to Remand.

Extract from the Minutes Book, April Term, 1889.

20 NEW ORLEANS, SATURDAY, *May 18th*, 1889.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

R. P. MACLAY, Tutor,
vs.
EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. } No. 11801.

This cause came on this day to be heard on the motion of the plaintiff to remand the cause to the civil district court for the parish of Orleans,—Chas. Carroll appearing for mover, H. C. Miller, Geo. Denegre for the defendant—and was argued by the counsel for the parties respectively and submitted, when the court took time to consider.

Copy of Proceedings and Certificates.

Power of attorney offered on motion to remand, May 18, '89. Filed May 18th, 1889.

Office of the Equitable Life Assurance Society of the U. S., No. 120 Broadway, New York.

NEW YORK, *April 7th*, 1880.

Know all men by these presents that in accordance with a
21 resolution of the board of directors passed April 23, 1879, we do hereby appoint and empower Andrew A. Woods, of the city of New Orleans, parish of Orleans, in the State of Louisiana, as our true and lawful attorney in and for the State, on whom any process of law may be served in any action or proceedings against said company in the State of Louisiana, subject to and in accordance with all the provisions of the laws of said State; and that any legal service, original, mesne, or final, on such agent shall be taken and held as valid as if served on the company; and that acknowledgments of service of such process by him for or on behalf of this company shall be obligatory on it, and that judgment recovered on such service or acknowledgment shall be conclusive evidence of the indebtedness of the company. Agents are authorized to make, alter, or discharge contracts or waive forfeitures.

In testimony whereof we have hereunto affixed our signatures and the seal of the company the day and year above written.

(Signed) JAMES W. ALEXANDER,
[L. S.] *Vice-president.*
(Signed) SAM. BUROWE, *Secretary.*

Copy of the Proceedings of the Board of Directors of the Equitable Life Assurance Society of the U. S.

NEW YORK, *April* 23, 1879.

Resolved, That the committee on agencies of this board are hereby authorized to appoint by resolution agents and attorneys for the several States in accordance with the laws thereof, and that such resolution of said committee shall have the same power
22 and binding force as if passed by the board and be regarded as passed by this board.

In pursuance whereof, at a special meeting of the committee on agencies of said board of directors, convened this day at the call of its president, a quorum being present, the following resolution was offered and unanimously adopted:

Resolved, That the president and secretary of this company be authorized to appoint Andrew A. Woods, of the city of New Orleans, parish of Orleans, State of Louisiana, as its true and lawful attorney in and for said State, on whom any process of law may be served in any action or proceeding against this company in the State of Louisiana, subject to and in accordance with all the provisions of

the laws of the State of Louisiana, and that any legal service, original or mesne or final, on such agent shall be taken and held as valid as if served on the company; and that acknowledgment of such service of process by him for or on behalf of this company shall be obligatory on it, and that judgment recovered on such service or acknowledgment shall be conclusive evidence of the indebtedness of the company.

(Signed) JAMES W ALEXANDER,
Vice-president.
SAML BORROW, *Secretary.*

STATE OF NEW YORK, }
City of New York, }

I, Charles Nettleton, a commissioner for the State of Louisiana in the State aforesaid, do hereby certify that I am personally acquainted with James W. Alexander, V-prest., & Samuel Borrowe, secretary, of the Equitable Life Assurance Society of the
23 U. S., whose names are signed to the within paper, and that they are respectively president and secretary of the Equitable Life Assurance Society & Life Insurance Company of the United States.

Given under my hand and official seal this eighth day of April, 1880.

[L. S.] CHARLES NETTLETON,
Commissioner for the State of Louisiana at New York.

UNITED STATES OF AMERICA, }
State of Louisiana, }

I, the undersigned, secretary of the State of Louisiana, do hereby certify the above and foregoing to be a true and correct copy of the warrant of appointment of Andrew A. Woods, Esq., of the city of New Orleans, as agent of the Equitable Life Assurance Society, deposited, filed, and duly recorded this day in this office, in pursuance of the provisions of act No. 21 of the General Assembly of this State, entitled "An act relative to insurance companies *and* incorporated under the laws of this State, and requiring them to appoint agents on whom legal process may be served, and providing penalties for a violation of the provisions thereof," approved February twenty-seventh, eighteen hundred and seventy-seven.

Given under my signature and the — State of Louisiana, at the city of New Orleans, this seventeenth day of April, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] OSCAR ARROYO,
Ass't Secretary of State.

24 Act 21 of 1877, offered on motion to remand.

No. 21.

An act relative to insurance companies not incorporated by the laws of this State, and requiring them to appoint agents on whom legal process may be served, and providing penalties for a violation of the provisions thereof.

SECTION 1. Be it enacted by the senate and house of representatives of the State of Louisiana in General Assembly convened, That no insurance company organized under the laws of any other State, or any foreign government, shall, directly or indirectly, take risks or transact any business through an agent in this State until such insurance company shall have filed in the office of the secretary of state a certified copy of the vote or resolution of the trustees, or directors of said company, appointing such agent to transact business and take risks, accompanied by a warrant of appointment under the official seal of the company, and signed by the president and secretary. Such warrant shall continue valid and irrevocable until another agent shall be substituted, so that at all times, while any liability remains outstanding there shall be within this State an agent or attorney aforesaid; and such warrant shall not be valid unless it contains consent expressed that service of legal process, original, mesne or final on such agent, shall be taken and held as valid as if served on the company, and that acknowledgment of service of such process by him, for — on behalf of such company, shall be obligatory on it, and that judgment recovered on
25 such service or acknowledgment shall be conclusive evidence of the indebtedness of the company.

SEC. 2. Be it further enacted, etc., That it shall not be lawful for any agent of any insurance company, not incorporated by the laws of this State, to take any risks or transact any business until he has obtained from the secretary of state a certificate that the provisions of this act have been complied with by the company for which he acts.

SEC. 3. Be — further enacted, etc., That a duly certified copy of the instruments required by section first to be filed with the secretary of state shall be received in evidence in lieu of the original.

SEC. 4. Be it further enacted, etc., That any person who shall, after the first day of April, eighteen hundred and seventy-seven, act as agent of any insurance company, not incorporated by the laws of this State, in taking any risks, or transacting any business, or receiving any premiums on policies issued or to be issued, without an appointment made and filed in accordance with the provisions of this act, shall be deemed guilty of a misdemeanor, and punished with fine or imprisonment, or both, at the discretion of the court.

SEC. 5. Be it further enacted, etc., That this act shall take effect on the first day of April, eighteen hundred and seventy-seven.

(Signed) LOUIS BUSH,
Speaker of the House of Representatives.

(Signed) LOUIS A. WILTZ,
Lieutenant Governor and President of the Senate.

Approved February 26th, 1877.
(Signed) FRANCIS T. NICHOLLS.
Governor of the State of Louisiana.

A true copy.

OSCAR ARROYO,
Assistant Secretary of State.

26 *Motion to Remand Denied.*

Extract from the Minute Book, April Term, 1889.

NEW ORLEANS, WEDNESDAY, *June* 12, 1889.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

R. P. MACLAY, Tutor,
vs.
EQUITABLE LIFE ASSURANCE SOCIETY. } No. 11801.

This cause came on at this term to be heard on the motion filed by the plaintiff herein to remand this cause to the civil district court for the parish of Orleans, whence the same originated, and was argued by the counsel for the parties respectively and submitted; on consideration whereof it is ordered that the said motion to remand be refused.

Answer. Filed Nov'r 5th, 1889.

ROBERT P. MACLAY, Tutor of Mason Snowden,
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES. } No. 11801.

Now comes the Equitable Life Assurance Society of the United States, a corporation established by law, and for answer to plaintiff's petition denies all and singular the allegations therein contained, except in so far as is hereinafter specially admitted.

This respondent admits that on the 5th of July, 1870, it in-
27 sured the life of Samuel H. Snowden for the sum of ten thousand dollars, loss payable to the wife of said Snowden, or, in case of her death, to the children of the marriage, and the policy evidenced by said contract of insurance was duly issued; that subsequent to the issue of said policy the said wife died, and the sole child of the marriage is Mason Snowden; that in said policy and others of like class of this company there is the provision inserted in the interest of the assured for the surrender of the policy on payment of its surrendered value whenever demanded by the assured, so that, in the event of inability to pay premiums or from other causes deemed sufficient by the assured, he has the right when he chooses and at his discretion, to surrender and claim the said surrender value of the policy; that on the 19th of July, 1886, in the exercise of said right conferred by said contract of insurance, Samuel

H. Snowden, the father and administrator of said minor and his guardian, duly appointed by the chancery court of Woodsville county, Mississippi, the court of the domicil of said minor, demanded payment of this defendant of said surrender value of said policy, and, in conformity with the said right and demand of the assured and the corresponding obligation of defendant, this defendant, on the said 19th of July, 1886, paid to said father and guardian the said full surrender value of said policy, to wit, the sum of three thousand one hundred and seventy-three dollars and forty cents, and accordingly the said policy was surrendered and cancelled, all liability of this defendant discharged, and the receipt for said payment in full acquittance of all said liability was duly given and acquitted by said father and guardian to said defendant, and
28 defendant now pleads said payment, discharge, and acquittance against and in bar of plaintiff's petition.

Wherefore respondent prays for judgment in its favor and against the plaintiff for costs and for general relief

(Signed) W. D. DENEGRE,
HENRY C. MILLER,
Att'ys for Def't.

Empaneling of Jury, Hearing, and Continuance.

Extract from the Minute Book, November Term, 1889.

NEW ORLEANS, FRIDAY, *January* 17, 1890.

Court met pursuant to adjournment.

Present: Hon. Edward C. Billings, district judge.

R. P. MACLAY, Tutor, &c., vs. EQUITABLE LIFE ASSURANCE SOCIETY. } No. 11801.

This cause was called for trial.

Present: Chas. Carroll and F. L. Richardson, attorneys for plaintiff; Henry C. Miller and W. D. Denegre, for defendant.

Whereupon the following-named jurors were called and sworn to well and truly try the issue joined herein, to wit:

29

1. E. F. Ziegler.	7. Victor Grimmer.
2. E. L. Kursheedt.	8. A. F. Hickman.
3. F. Varenholt.	9. Jas. Drouett.
4. Jas. McWhann.	10. W. A. Davis.
5. L. P. Alfred.	11. W. S. Fassman.
6. B. C. Shields.	12. Thos. Gannon.

And the court appointed E. F. Ziegler foreman of the said jury, and the trial was proceeded with. After hearing the pleadings, evidence, and arguments of counsel in part, the court ordered the cause to go over until to-morrow, at 11 a. m.

Hearing and Verdict.

Extract from the Minute Book, November Term, 1889.

NEW ORLEANS, SATURDAY, *Jan'y* 18, 1890.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

R. P. MACLAY, Tutor,
vs.
EQUITABLE LIFE ASSURANCE SOCIETY. } No. 11801.

This cause, as continued from yesterday, was this day resumed, and the counsel for the parties respectively, as well as the
30 jurors empannelled in the cause, being all present, the trial was proceeded with. After hearing further argument from counsel and receiving a charge from the court, the said jury did then and there, in open court, through their foreman, render and deliver the following verdict:

We, the jury, find a verdict for the defendant.

E. F. ZIEGLER, *Foreman.*

N. O., Jan. 18, '90.

Whereupon it was ordered that the said verdict be recorded, and it is done accordingly.

Rule for New Trial. Entered and Filed Jan. 22, '90.

R. P. MACLAY, Tutor,
vs.
THE EQUITABLE LIFE INSURANCE SOCIETY. } No. 11801.

On motion of Charles Carroll and F. L. Richardson, of counsel for plaintiff in the above-entitled cause, it is ordered that defendant do show cause on the 8th day of February, 1890, at 11 a. m., why a new trial should not be granted herein on the ground that the verdict rendered against him was contrary to law and the evidence, in this:

1st. That sec. six of the insurance policy herein sued upon,
31 stipulating that at the expiration of the tontine period said policy should have "a surrender value," did not bind said company to pay said amount, nor was it the collection of an acknowledged and liquidated amount due the minor, and there was error in the charge of the court to the jury that this was only a collection of a debt.

2nd. That the evidence showed that the policy herein sued upon was sold by the guardian, Snowden, to defendant company, and said sale — without authority of court and in violation of the laws of Mississippi, and defendant acquired no legal right thereto.

Marshal's Return.

Received by U. S. marshal, New Orleans, La., Jan'y 24, and on the same day I served a true copy of the within rule on W. D. Denegre, Esq., by handing the same to him in person at his office. Returned Jan. 25, '90.

(Signed) J. B. DONNALLY,
U. S. Marshal.
By J. B. DONNALLY, Jr.,
Dy U. S. M'l.

Order: New Trial Refused.

Extract from the Minute Book, November Term, 1889.

NEW ORLEANS, TUESDAY, *March* 25, 1890.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

32 R. P. MACLAY, Tutor,
vs. } No. 11801.
EQUITABLE LIFE ASSURANCE SOCIETY.

This cause came on to be heard on the motion for a new trial herein, filed by the plaintiff, and was argued by the counsel for the parties respectively; whereupon and upon consideration thereof, for the reasons assigned, it is ordered that the said application for a new trial be refused, and that the verdict herein remain undisturbed.

Bill of Exceptions. Filed ——, 1890.

R. P. MACLAY, Tutor,
vs. } No. 11801.
EQUITABLE LIFE INS. SOCIETY OF THE U. S.

Be it remembered that on the 18th day of January, 1890, this cause being on trial before the court with a jury—

The evidence established that Samuel H. Snowden insured, on the tontine plan, his life in favor of his wife or her heirs, as per policy of insurance offered in evidence and hereto annexed as Exhibit "B."

33 That at the death of his wife, in Mississippi, he was appointed and qualified under the laws of the State of Mississippi as administrator of her estate and as guardian of his minor son, Mason Snowden—

The proceedings by which he was appointed guardian being offered in evidence and annexed as Exhibit "C," as also the proceedings by which he was appointed administrator of his wife's estate, marked Exhibit "E," that the said Mason Snowden was the only child of Samuel H. Snowden and his wife, and as such entitled

after the death of his mother to the payment of whatever might become due under the policy.

That when the tontine period on the policy was reached and the policy had a surrender value, proven to have been $3,170.40, Samuel H. Snowden, as guardian, applied to the insurance company for the payment of this surrender value, and that the full amount of the surrender value was paid him, and that he received and receipted for said sum as guardian, producing and attaching to his receipt his letters as guardian, which letters are attached to the policy, hereto annexed, and were in evidence.

He did not make any application to the chancery court for any order specially authorizing him so to do.

That subsequently Samuel H. Snowden died, and the plaintiff, Maclay, was appointed and qualified in Louisiana as tutor of the minor and brought this suit.

After the evidence was closed and before the jury retired to deliberate upon their verdict the counsel for plaintiff requested the
34 court to instruct the jury that the receipt of the said amount and discharge of the policy was invalid and did not bind the ward, and the said guardian, S. H. Snowden, in receiving it and attempting to discharge the insurance policy, had no authority of the court or of a family meeting or any other authority, excepting that which was vested in him as guardian of the minor under the laws of Mississippi; that the transaction was either a compromise or a sale of a debt and therefore was contrary to sections 2065 and 2106 and 2110 of the Revised Statutes of the State of Mississippi, which prohibit the compromise or the sale of debts by guardians of minors without order of court; a copy of said section of the Revised Statutes of Mississippi for the year 1880 is hereto annexed and made part hereof and marked Exhibit "A;" and, further, that the letter of V. Vancis, actuary of defendant's company, hereto annexed and made part hereof and marked Exhibit "D," showed that the company itself considered the transaction a bargain and sale.

These instructions the court refused to give and declined to approve of each of these propositions, but instructed the jury that the transaction on the part of the former guardian, by which he received the surrender value of the policy, was neither a compromise nor a sale of a debt, but, on the other hand, was the collection of a debt which was due in the alternative at the option of the guardian, and that the guardian had authority as a common-law guardian under the laws of Mississippi to make such collection. (The policy upon which the suit is brought is hereto annexed and made part of this bill of exception and marked Exhibit "B.")

To the refusal of the court to give each of the instructions
35 requested and to each of the instructions given the plaintiff's counsel then and there, before the jury retired to deliberate upon their verdict, excepted, and, since these matters do not appear of record, present this their bill of exceptions, which is allowed accordingly.

Aug. 25, 1890.

(Signed) EDWARD C. BILLINGS, *Judge.*

Policy of insurance, marked Exhibit B, referred to in bill of exceptions, copied at page 7 of this transcript.

Proceedings under which S. H. Snowden was Appointed Guardian, as Exhibit "C" Referred to in Bill of Exceptions.

Letters of Guardianship.

THE STATE OF MISSISSIPPI, }
Wilkinson County, } *set:*

By the Chancery Court of said County.

Be it remembered that at a rules of the chancery court of Wilkinson county, begun and held at the court-house thereof, in the town of Woodville, on the first Monday in March, in the year of our Lord one thousand eight hundred and eighty-four, S. H. Snowden having entered into bond with sufficient security, as directed by law, he was appointed guardian of the person and estate, real and personal, of Mason Snowden, minor child of M. L. M. Snowden, deceased.

36

And the said S. H. Snowden is hereby authorized and required faithfully to execute his office and trust as guardian aforesaid; to deliver into the office of the clerk of the court aforesaid, within three months from the date thereof, an inventory, on oath, of all the estate, real and personal, of the said minor; also annually, or whenever thereunto required by lawful authority, to render a just and true account of his guardianship, and to do and perform whatsoever of him as guardian aforesaid shall be required by the statutes which now are or hereafter may be made and provided in this behalf.

Witness the Honorable Lauch McLaurin, chancellor of the 10th district, this 4th day of March, A. D. 1884, and the seal of said court, hereunto affixed.

[L. S.] (Signed) R. W. P. HUFF, *Clerk.*

THE STATE OF MISSISSIPPI, }
Wilkinson County, }

I, R. W. P. Huff, clerk of the chancery court of said county, do hereby certify that the foregoing one page contains a true and correct transcript and copy of the letters of guardianship of the person and estate of Mason Snowden, a minor, to S. H. Snowden, as the same appears of record and on file in my office. I further certify that S. H. Snowden is still acting as such guardian.

37

Witness my hand and seal of office this 7th day of August, 1885.

[SEAL.] (Signed) R. W. P. HUFF, *Clerk.*

Chancellor's Certificate.

THE STATE OF MISSISSIPPI, }
Wilkinson County. }

J. Lauch McLaurin, chancellor 10th judicial district (sole and presiding), do hereby certify that R. W. P. Huff, whose signature appears to the foregoing certificate and attestation, is and was at the date thereof clerk of said court, duly elected, qualified, and commissioned; that his said certificate is in due form of law, and that all of his acts in the premises are and ought to be entitled to full faith and credit in judicature and thereout.

Witness my hand and seal, at Woodville, Mississippi, this 7th day of August, A. D. 1885.

[SEAL.] (Signed) LAUCH McLAURIN,
Chancellor.

THE STATE OF MISSISSIPPI, }
Wilkinson County. }

I, R. W. P. Huff, clerk of the chancery court in and for said county and State, do hereby certify that Lauch McLaurin,
38 whose genuine signature appears to the foregoing certificate, is and was at the date thereof judge of said court (sole and presiding) in and for said county, duly appointed, qualified, and commissioned, and that all of his acts in the premises are and ought to be entitled to full faith and credit in judicature and thereout.

Witness my hand and seal of said court, at Woodville, Mississippi, this 7th day of August, A. D. 1885.

[SEAL.] (Signed) R. W. P. HUFF, *Clerk.*

Proceedings under which S. H. Snowden was Appointed Administrator of his Wife's Estate, Marked Exhibit "E" Referred to in Bill of Exceptions.

Est. M. M. SNOWDEN, Dec'd. No. 922.

Motion by S. H. Snowden for approval of bond and grant of letters of administration in accordance with prayer of petition.

Said motion is sustained; and the said S. H. Snowden having appeared and entered into bond in the sum of five thousand dollars, with Edward Aaron and T. M. Witherill as securities, and having taken the oath prescribed by law, letters of administration of the estate of Mary M. Snowden, dec'd, are accordingly granted to the said S. H. Snowden. It is further ordered that E. A. Robinson, Howard Wailes, and Nath. Cropper be appointed appraisers
39 to value and appraise the goods, chattels, and personal estate of said decedent, and that a warrant issue accordingly.

Ordered at rules this 4th day of Dec'r, 1883.

(Signed) J. W. CHRISHOLM, *Clerk.*

STATE OF MISSISSIPPI, }
Wilkinson County. }

I, R. W. P. Huff, clerk of the chancery court in and for said county and State, do hereby certify that the foregoing is a true and correct copy of the order in the above-styled case, as fully as the same appears of record in Minute Book No. 2, page 142, of the records of my office.

Witness my hand and seal of office this 9th Dec'r, 1889.

[SEAL.] (Signed) R. W. P. HUFF, *Clerk.*

Estate of MARY M. SNOWDEN, Deceased.

Administrator's Bond.

THE STATE OF MISSISSIPPI, } *ss:*
Wilkinson County, }

In the Chancery Court of said County, at Rules, Dec. 4, A. D. 1883.

Know all men by these presents that we, S. H. Snowden, Edw. Aaron, and T. M. Wetherill, of the county of Wilkinson and State of Mississippi, are held and firmly bound unto the State of Mississippi in the penal sum of five thousand dollars, current money of the United States; which payment, well and truly to be made and performed, we and each of us do hereby bind ourselves, our heirs, executors, administrators, and assigns, jointly, severally, and firmly by these presents.

Witness our hands and seals this 4th day of Dec., A. D. 1883.

The condition of this bond is that *is* the above-bonded S. H. Snowden, as administrator of the goods and chattels, rights and credits, of Mary M. Snowden, deceased, shall faithfully, truly, and promptly perform and discharge all the duties required of him by law or by the order of the court, then this obligation to be void; otherwise to remain in full force.

(Signed) S. H. SNOWDEN. [L. S.]
EDW. AARON. [L. S.]
THOS. M. WETHERILL. [L. S.]

Signed, sealed, and delivered in presence of—
[L. S.] (Signed) J. W. CHESHOLM,
Clerk of the Chancery Court.

I approve the above bond and the security thereto this the — day of ——, 18—

—— ——.

Administrator's Oath.

THE STATE OF MISSISSIPPI, } *ss:*
Wilkinson County, }

You do swear that Mary M. Snowden, the deceased, died without any will, so far as you know or believe, and that you will well and truly administer all and singular the goods, chattels, and credits of

the deceased and pay her debts as far as her goods, chattels,
41 and credits will extend and the law requires you, and that you will make a true and perfect inventory of all the said goods, chattels, and credits, as also a just account when thereto required, so help you God.

[L. S.] (Signed) S. H. SNOWDEN.

Sworn to and subscribed before me this 4th day of Dec., 1883.

[SEAL.] (Signed) J. W. CHESHOLM, *Clerk.*

THE STATE OF MISSISSIPPI, }
Wilkinson County, } *ss:*

Chancery Court.

Personally appeared this day before me, J. W. Chesholm, clerk of the chancery court of said county, Edw. Aaron and Thomas M. Wetherill, the sureties, whose names are signed to the within bond, who, being severally sworn, depose and say that they are worth over and above all their legal liabilities, and that they have visible property subject to levy and sale under execution over and above all property exempted by law from sale for debt—the said Edw. Aaron, the sum of twenty-five hundred dollars; the said Thos. M. Wetherill, the sum of twenty-five hundred dollars.

Sworn to and subscribed before me this 4th day of Dec., 1883.

[L. S.] J. W. CHESHOLM,
Clerk of Chancery Court.

The above-named Edw. Aaron & Thos. M. Wetherill this day severally acknowledged before me, J. W. Chesholm, clerk of the chancery court of — county, Mississippi, that they signed, sealed,
42 and delivered the within and foregoing bond on the day and date thereof, for the purposes therein set forth, as their act and deed.

Given under my hand and seal of office this 4th day of Dec., A. D. 1883.

[L. S.] (Signed) J. W. CHESHOLM, *Clerk.*

STATE OF MISSISSIPPI, }
Wilkinson County. }

I, R. W. P. Huff, clerk of the chancery court in and for said county and State, do hereby certify that the foregoing is a true and perfect copy of the bond of S. H. Snowden, administrator of the estate of Mary M. Snowden, dec'd, as fully as the same appears of record in my said office.

Witness my hand and seal of office this 9th day of December, A. D. 1889.

[SEAL.] (Signed) R. W. P. HUFF, *Clerk.*

STATE OF MISSISSIPPI, }
Wilkinson County. }

I, R. W. P. Huff, clerk of the chancery court in and for said county and State, do hereby certify that the foregoing two pages contain a true and perfect copy of all the proceedings in the administration of the estate of M. M. Snowden as fully as the same appear of record in my said office.

Witness my hand and seal of office this 9th day of December, A. D. 1889.

[SEAL.] (Signed) R. W. P. HUFF, *Clerk.*

13 *Chancellor's Certificate.*

THE STATE OF MISSISSIPPI, }
Wilkinson County. }

I, W. R. Trigg, chancellor 4th judicial district (sole and presiding), do hereby certify that R. W. P. Huff, whose signature appears to the foregoing certificate and attestation, is and was at the date thereof clerk of said court, duly elected, qualified, and commissioned; that his said certificate is in due form of law, and that all of his acts in the premises are or ought to be entitled to full faith and credit in judicature and thereout.

Witness my hand and seal, at Woodville, Mississippi, this 9th day of December, A. D. 1889.

[SEAL.] (Signed) W. R. TRIGG, *Chancellor.*

THE STATE OF MISSISSIPPI, }
Wilkinson County. }

I, R. W. P. Huff, clerk of the chancery court in and for the said county and State, do hereby certify that W. R. Trigg, whose genuine signature appears to the foregoing certificate, is and was at the date thereof chancellor of said court (sole and presiding) in and for said county, duly appointed, qualified, and commissioned, and that all of his acts in the premises are and ought to be entitled to full faith and credit in judicature and thereout.

Witness my hand and seal of said court, at Woodville, Mississippi, this 9th day of December, A. D. 1889.

[SEAL.] (Signed) ——— ———, *Clerk.*

Ex' *Sections of the Revised Statutes of Mississippi for Year* 1880, "*Exhibit A.*"

Extract from Revised Code of Mississippi.

SECTION 2065. The chancery court may, by decree, authorize any executor or administrator to sell or compromise any claim due the estate which cannot be readily collected, if the executor or administrator shall petition for that purpose, and shall show that such sale or compromise will promote the interests of the estate, but no such order of sale shall be made until twelve months have elapsed from

the grant of the letters; and if a sale be ordered, it shall be at the court-house door, for cash, to the highest bidder, but the executor or administrator shall first give twenty days' notice of the time and place of such sale by advertising the same in an newspaper printed in the county, if there be such, but if not, then in a newspaper published in some convenient county.

And the executor or administrator shall make report, in writing, of sales and compromises made according to the provisions of this section, to the next succeeding term of the court, which may then be confirmed, unless good cause be shown for setting the same aside.

SECTION 2106. The court may order a sale of personal progerty of a ward, whenever the interests of such ward will be promoted thereby, which sale shall be made as directed by the court.

SECTION 2110. Guardians may be empowered by the court to sell or compromise claims due their ward on the same terms prescribed in reference to the sale or compromise of claims due estates of deceased persons.

44 *Letter of Van Cise, Actuary of Defendant's Company, Marked Exhibit "D," Referred to in Bill of Exceptions.*

The Equitable Life Assurance Society, 120 Broadway.

NEW YORK, *April 17th*, 1886.

S. H. Snowden, Esq., Waterloo, La., care of A. A. Woods, Esq.

DEAR SIR: Your favor of the 8th inst. is received, making inquiries in regard to your tontine policy, No. 54688.

We must confess to a feeling of surprise that, after the liberality which the society has shown in agreeing to purchase your policy and pay therefor its entire share of the assets, you should evince such a lack of confidence in the officers of this institution. It is certainly no fault of ours that you did not read your policy upon receiving it or before paying any premium thereon. As an intelligent man you must know that all contracts between life-insurance companies and their policy-holders are comprised in the application upon which the policy is issued and the policy itself.

45 It is expressly stated in all policies that agents have no power to make or waive contracts, for the simple reason that if such power were recognized no life-insurance company could exist and do business. We endeavor to employ honest and intelligent agents, but hold ourselves in nowise bound by either their verbal or written representations.

We had no thought when your policy was issued of giving you or any other holder of a similar policy the option of withdrawing his entire share of the society's assets in cash at the termination of the tontine period. The giving of such a privilege is entirely an act of grace upon the part of the society, and we repeat that we are very much surprised, after the granting of such a privilege, to receive such a letter from you as the one to which we now reply.

If the managers of this society had the slightest desire or could

afford to defraud you or any one of its policy-holders out of their just dues, to say nothing about the question of principle or honesty, you must be aware that we could prepare false statements, as well as give false results, and that a statement of the kind you ask for, if given, would be of no value to you whatever. Where the result arrived at is false the details must be false, no matter how carefully prepared. The simple fact, however, is that we do not prepare such a statement as you ask for and never have prepared it for any one of our policy-holders.

While the results on our tontine policies are arrived at by careful and accurate calculations, which cover all the sources of profit which go to make up these results, neither this society nor any other life-insurance company can put such calculations
46 in shape to be intelligible to the mass of their policy-holders. Besides this, no company could, without suspending its ordinary business, give an accounting to each policy-holder of its dealings with his policy.

This matter has already been passed upon judicially by the general term of the court of common pleas in this city in the case of Uhlman *vs.* The New York Life Insurance Company. The opinion of the court was written by Judge Beach and concurred in by Chief Justice Daly. It was held that the relation created between the parties by the insurance policies in question was not fiduciary, but rested on contract. It was further held that the determination of the amount of profits at the end of the tontine period is a duty confided to the company, and cannot be questioned by the plaintiff except on proof of non-performance of the contract obligation, and that the mere ownership of a policy does not confer the right to investigate a company's business so as to discover whether or not the sum for division has been correctly determined and the proper dividend declared.

There are some things in this world which must be taken on trust, and among these are the dividends declared on life-insurance polices. The proper management of these institutions may safely be left to competition, which makes it for the interest of each company to do as well as possible by its policy-holders, and to the supervision of the proper officers of the insurance departments of the various States, whose sworn duty it is to see that the companies are solvent and fully and equitably carry out their contracts with
47 their policy-holders. To furnish statements giving the details by which dividends are made up is simply an impossibility under the present methods by which companies conduct their business, and with the force of employees which they now keep and have heretofore kept on hand, and this fact is fully recognized by the court to whose decision we have referred above.

As bearing somewhat on the reputation of this society for liberality and fair dealing with its policy-holders, we might mention the fact that for many years we have done the largest new business of any life-insurance company in the world, and that our business for this year promises to be the largest in the history of the society.

As regards your particular policy, we do not for a moment ques-

tion the honesty of Mr. Cleveland in making his representations, and we can readily understand that, relying upon these representations, you are disappointed in the results. We did not ascertain until a short time before he left our service that Mr. Cleveland was very much in error in his ideas as regards the results of tontine policies, and, in addition to the unintentional errors upon which he based his representations, neither he nor the society anticipated the high rate of mortality which has prevailed among the holders of policies in our Southern class. This rate has been 50% higher than among holders of our ordinary policies, and, as a matter of course, there has been a corresponding reduction in the amount of surplus accumulated.

Still you will find, after you have paid the premiums necessary to the completion of your tontine period, that the settlement of your policy is a very favorable one, considering the fact of your life's having been assured for the period of 16 years for
18 $10,000. We will send you a statement of the exact figures, both as regards cash value and amount of paid-up assurance, as soon as we shall be apprised that all your premiums have been paid up to and including the premium due on the 5th inst.

Yours truly, (Signed) J. G. VAN CISE,
Asst Actuary

Judgment.

Extract from the Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, November Term, 1889.

NEW ORLEANS, SATURDAY, *January* 18, 1890.

Court met pursuant to adjournment.
Present: Hon. Edward C. Billings, district judge.

R. P. MACLAY, Tutor, etc.,)
vs.) No. 11801.
EQUITABLE LIFE ASSURANCE SOCIETY OF THE U. S.)

By reason of the verdict of the jury herein and in accordance therewith, it is ordered, adjudged, and decreed that there be
19 judgment in favor of the defendant, The Equitable Life Assurance Society of the United States, and against the demand of the plaintiff, Robert P. Maclay, tutor of Mason Snowden, a minor child, the sole issue of Samuel H. Snowden and Mary Louisa McGehee, dismissing his suit with costs.

Judgment rendered January 18, 1890.
Judgment signed March 26, 1890.

(Signed) EDWARD C. BILLINGS, *Judge.*

Petition for Writ of Error. Filed Sept. 4th, 1890.

ROBERT P. MACLAY, Tutor,
vs. No. 11801.
THE EQUITABLE LIFE ASSURANCE SOCIETY.

To the honorable the judges of the United States circuit court for the fifth circuit and eastern district of Louisiana:

And now comes Robert P. Maclay, tutor of the minor, Mason Snowden, by Charles Carroll and F. L. Richardson, his attorneys, and complains that in the record and proceedings and also in
50 the rendition of a judgment in a suit between R. P. Maclay, tutor, plaintiff, and The Equitable Life Assurance Society, defendant, in the U. S. circuit court for the fifth circuit and eastern district of La., at the April term thereof, A. D. eighteen hundred and ninety, and in which judgment was rendered against him on the 25th day of March, A. D. 1890, a manifest error hath intervened, to the great damage of said plaintiff.

Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

(Signed) CHARLES CARROLL,
F. L. RICHARDSON,
Att'ys for Pl'ff.

Order.

Let a writ of error in the above numbered and entitled cause herein prayed for be granted, returnable to the Supreme Court of the United States at the next term thereof, to wit, the — day of ——, 1890, on petitioners giving bond in the sum of two hundred and fifty dollars.

Aug. 25, 1890.

(Signed) EDWARD C. BILLINGS, *Judge.*

Notice of petition for and order allowing writ of error herein acknowledged and service of the citations in this cause acknowledged, both without waiver or prejudice.

New Orleans, Sept 4, 1890.

WALTER D. DENEGRE,
HENRY C. MILLER,
Per. W. D. D.,
Attorneys for the Equitable Life Assurance Society of the U. S.

Bond for Appeal. Filed September 4, 1890.

51 Know all men by these presents that we, Robert P. Maclay, tutor of the minor, Mason Snowden, as principal, and Charles Carroll, of New Orleans, as surety, are held and firmly bound unto the Equitable Life Assurance Society of the United States in the full and just sum of two hundred and fifty dollars, to be paid to the said

Equitable Life Assurance Society of the United States, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally, by these presents.

Sealed with our seals and dated this fourth day of September, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, in a suit depending in said circuit court, wherein Robert P. Maclay, tutor of the minor, Mason Snowden, is plaintiff and The Equitable Life Assurance Society of the U. S. is defendant, judgment was rendered against said Robert P. Maclay, tutor, plaintiff, *defendant*, and the said Robert P. Maclay, tutor, etc., having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said Equitable Life Assurance Society of the U. S., citing and admonishing said Equitable Life Assurance Society of the United States to be and appear at the Supreme Court of the United States to be holden at Washington the second Monday of October next;

Now, the condition of the above obligation is such that if the said Robert P. Maclay, tutor of the minor, Mason Snowden, shall prosecute said writ to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

ROBERT P. MACLAY, [L. S.]
Tutor of Mason Snowden.

By his attorneys-at law, CHARLES CARROLL. [L. S.]
CHARLES CARROLL. [L. S.]

Sealed and delivered in the presence of—
H. J. CARTER.

Bond and sufficiency of surety approved.
Sept. 4, 1890.

EDWARD C. BILLINGS, *Judge.*

52 [Endorsed:] No. —. United States circuit court, eastern district of Louisiana. —— —— *vs.* —— ——. Bond for writ of error. Filed —— —, 188– —— ——, clerk.

UNITED STATES OF AMERICA, } 88:
Eastern District of Louisiana.

Personally appeared —— ——, who, being duly sworn, deposes and says that he is the surety on the within bond; that he resides ——, and is worth the full sum of —— dollars over and above all his debts and liabilities and property exempt from execution.

—— ——

Subscribed and sworn before me this — day of ——, 188–.

—— ——,

Commissioner U. S. Circuit Court, Eastern District of Louisiana.

53 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 51 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced, on the trial of the case of Robert P. Maclay, tutor, etc., *vs.* Equitable Life Assurance Society, No. 11801 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 18 day of September, A. D. 1890.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

E. R. HUNT, *Clerk.*

I, Edward C. Billings, United States judge for the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was at the time of signing said certificate and is now the clerk of said court; that said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 18 day of September, A. D. 1890.

EDWARD C. BILLINGS, *Judge.*

54 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the circuit court of the United States in and for the fifth circuit and holding sessions for the eastern district of Louisiana, New Orleans division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Robert P. Maclay, tutor of the minor, Mason Snowden, and The Equitable Life Assurance Society of the United States, in the case entitled Robt P. Maclay, tutor, etc., *vs.* Equitable Life Assurance Society, No. 11801 of the docket of the said circuit court, a manifest error hath happened, to the great damage of the said Robert P. Maclay, tutor, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said

Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court of the United States, this 1 day of September, in the year of our Lord one thousand eight hundred and ninety.

Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.

E. R. HUNT,
Clerk of the United States Circuit Court for the Eastern District of Louisiana.

55 [Endorsed:] United States circuit court. No. 11801. Robert P. Maclay, tutor of Mason Snowden, plaintiff in error, *versus* The Equitable Life Assurance Society of the United States, defendant in error. Writ of error. No. —. U. S. circuit court, eastern district of Louisiana, New Orleans division. Filed Sept. 4, 1890. H. J. Carter, d'y clerk.

56 *Reasons. Filed March 25, 1890.*

Circuit Court of the United States, Eastern District of Louisiana.

R. P. MACLAY, Tutor,
vs.
THE EQUITABLE LIFE ASSURANCE SOCIETY. } No. 11801.

This case is submitted on motion for a new trial.

The case was heard before the court with a jury, and the court directed a verdict for the defendant and expressed a willingness to hear the question of law involved in the case fully argued on the motion for a new trial.

That question is whether a former guardian of an infant, appointed by the proper court of the State of Mississippi, had, according to the laws of that State, authority to do what he has done in this case, *i. e.*, to elect to receive payment of the present worth of a life policy, which by virtue of the number of payments of premiums made thereon had come within the tontine plan, and thereby to discharge the defendant.

It appeared from the evidence in the cause that the plaintiff is tutor (guardian) of Mason Snowden, who is an infant; that Samuel H. Snowden, who was father of Mason Snowden, the ward in this case, obtained an insurance upon his own life in defendant's
57 company for the sum of $10,000, for the benefit of his wife; and in case of her death, for the benefit of his son, Mason Snowden. His wife died. He was appointed guardian of his son, Mason; and, as guardian, the policy having become one entitled to the tontine provision, received $3,173.40, the cash value of the same, and surrendered it. Subsequently Samuel H. Snowden died, and the plaintiff was appointed guardian of Mason Snowden and brings suit upon the policy issued upon the life of Samuel H. Snowden.

Thus is presented the question whether the election of the former guardian to receive the present worth and the receipt of it bound the infant. It is a question which must be decided as one arising under the laws of the State of Mississippi, which was the locus of the appointment of the guardian, Samuel H. Snowden.

The attorneys for the plaintiff have called the attention of the court to sections 2105 and 2110 of the Revised Code of Mississippi, and have argued that these provisions of the law required the sanction of the proper chancery court to authorize the guardian to elect to receive the present worth of the policy. Section 2106 related to the sale of personal property; section 2110 relates to the sale or compromise of doubtful claims. It seems to me this was neither a sale nor a compromise. It was the collection of a debt, the payment of which by the terms of the original contract of insurance might be in the alternative and according to the option of the beneficiary—that is, the guardian could have gone on paying the quarterly payments, and, at the death the person whose life was insured, the infant would have been entitled to
receive the full sum of $10,000.00, or he could receive in
58 discharge of the policy its cash value. The contract springing from the policy of insurance had come to be this. If Mason Snowden had been an adult, he could have elected which manner of payment he would enforce, and his receiving payment in either manner would have extinguished the obligation of the defendant; but neither manner of receiving payment amounted to a sale of property. The creditor had the election. When either manner was elected and payment received under it, there was effected the wiping out of a debt and not a transfer of property by sale.

Nor was there any compromise. A compromise is a settlement of a disputed claim by voluntary concession of one or both parties. Here nothing was conceded. The contract was simply carried out without concession from either party. So that it would seem that there was no statute requiring the guardian to obtain the sanction of the chancery court.

The question presented, then, is, did the guardian violate the rules which at the common law regulate and control the action of the guardian in electing to receive the present worth of the policy and in receiving it and discharging the defendant?

I think it may be laid down as universal rule, in the absence of a contrary statute, the guardian may collect the debts due to the ward. He may, in his discretion, collect secured debts before they are due. In Chapman *vs.* Tibbits, 33 New York R., p. 289, where the question was whether a guardian had rightfully collected a debt secured by a mortgage before it was due, the court of appeals, p. 290, says: "He (the guardian) possessed over the estate and property of
his wards the same power as a testamentary guardian, which
59 was to take the custody and managements of their personal estate and the profits of the real estate. This custody and management implies the power to collect and receive moneys due the minors, whether secured by mortgage or otherwise, and to exe-

cute discharges and receipts therefor." See also Botham *vs.* McIntier, 19 Pickering R., p. 346

Question has been made as to the right of the insured when payment is made under the tontine plan to a disclosure of the earnings and an accounting.

I have no doubt that such a right exists; but in order to reach the question on a motion for new trial there must be proper averments of fraud or mistake sustained by proof. In the petition the only matter presented is as to the right of the guardian to surrender the policy upon accepting its "cash value." The only testimony before the jury *pro* or *con*, as to the correctness of the amount received by the guardian was that of James W. Alexander, who says in reply to interrogatory 8th, "The amount was ascertained by our actuaries to be $3,173.10, which was correct."

Upon the pleadings and the uncontradicted facts the verdict should not be disturbed, and the application for a new trial must be refused.

Endorsed on cover: Case No. 14,320. E. Louisiana C. C. U. S. No. 281. Robert P. Maclay, tutor of the minor, Mason Snowden, plaintiff in error, *vs.* The Equitable Life Assurance Society of the United States. Filed October 17, 1890.

Office Supreme Court, U.S.
FILED.
NOV 24 1893
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

TERM NO. 281.

NO. 14,320.

R. P. MACLAY, TUTOR,

versus

EQUITABLE LIFE ASSURANCE SOCIETY.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

FRANK L. RICHARDSON.

NEW ORLEANS, LA., NOV. 1st, 1893.

T. J. Moran, Print, 125 Common Street, N. O.

SUPREME COURT OF THE UNITED STATES.

TERM NO. 281.

NO. 14,320.

R. P. MACLAY, TUTOR,

versus

EQUITABLE LIFE ASSURANCE SOCIETY.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

BRIEF IN BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

Mason Snowden, a minor, represented by Robt. P. Maclay, tutor, was the beneficiary of a life insurance policy in the defendant Company for the sum of $10,000, upon the life of his father, Saml. H. Snowden, a resident of the State of Mississippi.

On the 9th of March, 1888, his father and guardian died.

Robert P. Maclay, a resident and citizen of Louisi-

ana, was then appointed tutor of the minor. This suit was brought on the 12th of February, 1889, to recover the amount of the policy of $10,000, in the Civil District Court, Parish of Orleans, La. On petition of defendant, the cause was removed to the United States Circuit Court, Eastern District of La. A motion to remand was made and refused.

The defendant Company then answered, admitting the substantial allegations of the petition and specially plead "that in said policy, and others of like class of this Company, there is a provision inserted in the interest of the assured for the surrender of the policy on payment of its surrender value, whenever demanded by the assured, so that in the event or inability to pay premiums, or from other causes, and at his discretion, to surrender and claim the said surrender value of the policy; and on the 19th of July, 1886, in the exercise of said right conferred by said contract of insurance, Saml. H. Snowden, the father and administrator of said minor and his guardian duly appointed by the Chancery Court of Woodville County, Miss., the court of the domicil of said minor, demanded payment of this defendant of said surrender value of said policy, and in conformity with the said right and demand of the assured, and the corresponding obligation of the defendant, on the said 19th of July, 1886, paid to said father and guardian the said full surrender value of said policy, to-wit, the sum of $3173.40; and accordingly the said policy was surrendered and cancelled, all

liability of this defendant discharged, and the receipt for said payment in full acquittance of all said liability was duly given and acquitted by said father and guardian to said defendant, and defendant now pleads said payment, discharge and acquittance against and in bar of plaintiff's petition." See Record, page 18.

Upon the trial the jury found a verdict for defendant, and plaintiff, after his application for a new trial was refused, took this writ of error.

Upon the trial of the cause counsel for plaintiff requested the Court to instruct the jury, that the receipt of said amount set forth in the answer and discharge of the policy, was invalid and did not bind the ward, and the said S. H. Snowden, in receiving and attempting to discharge the insurance policy, had no authority of the Court or of a family meeting, or any other authority except that which was vested in him as guardian of the minor under the laws of Mississippi; that the transaction was either a compromise or sale of a debt, and therefore was contrary to Secs. 2065, 2106 and 2110 of the Revised Statutes of the State of Mississippi, a copy of which appears in Record, page 27.

And further, that the letter of J. G. Vancise, annexed thereto, R. page 28, attorney and agent of defendant Company, showed that the Company itself considered the transaction a bargain and sale.

These instructions the Court refused to give and declined to approve each of these propositions, but

instructed the jury that the transaction on the part of the former guardian, by which he received the surrender value of the policy, was neither a compromise nor a sale of a debt, but, on the other hand was the collection of a debt which was due in the alternative at the option of the guardian, and that the guardian had authority as a common law guardian under the laws of Mississippi to make such collection. The policy upon which this suit was brought was annexed to the bill of exceptions made to this ruling. See pages 4 and 28 of Record.

ARGUMENT.

The defendant Company claims to have acquired the policy herein sued upon by virtue of sale made by the guardian of the minor, also the insured. It is not claimed that the guardian did so upon judicial authority.

By the law of the State of Mississippi, set forth in page 27 of the Record, the personal property of the minor cannot be sold and converted into money unless on proper showing made, that it was required for the support of the minors. This was not done.

There was an offer from the Company to purchase a valuable piece of property belonging to a minor. The price was named by the Company. The policy was for $10,000 upon the Tontine plan. By this plan, at the end of ten years, during which the premiums were to be paid, the policy could be surrendered, and

a paid up policy issued: this was the surrender value. The Company offered $3170.40 for this policy to the guardian, and after some correspondence the guardian bought it. The question presented is, did he have a right to buy? As a general rule an insurance company may buy its policies, provided the owner accepts the offer and agrees on the price. The seller and the buyer must however be capable of buying and selling. If it is a guardian who sells the property of his ward, he must obtain authority from the Probate Court.

There was a question to be determined by the Probate Court, viz: whether it was best for the minor to be given a paid up policy or have the policy sold?

As appears by the Mississippi Statute quoted, this discretion was not left to the guardian.

The defendant Company on the trial claimed that this was the ordinary collection of a debt by the guardian for which no judicial authority was required.

The agent of the Company at the time of the transaction called it a purchase of the policy. (See letter of Vancise, page 28 of Record).

A sale is a transmutation of property from one man to another in consideration of some price. 2 Bl. 446.

A policy of $10,000 is sold for $3170.40. The Society acquired the policy. The guardian the money.

A thing was transferred for a sum of money, the price. Benjamin on Sales, page 1.

A sale is defined to be, an agreement by which one

of two contracting parties, called the seller, gives a thing and passes the title to it, in exchange for a certain price in current money to the other party, who is called the buyer or purchaser, who on his part agrees to pay such price. Bouv. L. Dict.; Black's L. Dict.,

A transfer of the absolute title to property for a certain agreed price. It is a contract between two parties, one of whom thereby acquires a property in the thing sold, and the other parts with it for a valuable consideration. Story on Sales, § 1; Creveling vs. Wood, 95 Pa. St. 158.

A sale is a present transfer by mutual agreement of the absolute or general title to certain property for a certain price. 2 Schouler on Personal Property, 2 Ed., § 200.

By the term sale is meant the transfer of the property in a thing, whether real or personal, for a price in money and not in goods or other property. Newmark on Sales, § 2.

By Art. 2439, La. Civil Code: "The contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself.

"Three circumstances concur to the perfection of the contract, to-wit., the thing sold, the price, and the consent.

Art. 2464, Civil Code of La: The price of the sale

must be certain, that is to say, fixed and determined by the parties. It ought to consist of a sum of money, otherwise it would be considered as an exchange.

Art. 2465, Civil Code: The price however may be left to the arbitration of third person; but if such person cannot, or be unwilling to make the estimation, there exists no sale.

This transaction possessed all these elements necessary for a sale. The only defect was the want of authority in the person, the guardian, to make it.

If it was a collection of a debt, the amount to be collected would have been fixed before the contract of sale was made—and payment of that definite sum could have been compelled by suit.

When a collection of a debt is made, nothing is given in return, except a receipt acknowledging payment.

The policy was to be due and payable to the minor or his tutor at the death of his father.

It was a contingent obligation liable to fall due at any day.

This uncertain right could be sold at any time, provided a price could be agreed upon by the minor represented by the tutor with the authorization of the Court and the Company; but the Company was not paying a fixed obligation, which they could have been compelled to do by suit.

If this transaction between the guardian and the Company was only the collection and payment of a debt, then it would not have been necessary for two parties to enter into an agreement to fix the amount to be paid, and to transfer the policy, for the price would have been a fixed and determinate sum—a sum fixed at the time the contract of insurance was effected. The debt would have been a fixed sum, demandable and enforceable by suit.

It would not have been left to the debtor to say how much or how little he should pay, or whether he should pay at all. Nor would it have been left to the collecting creditor to determine what amount he should receive, or whether it should be paid him at all.

The transaction was nothing more or less than an ordinary bargain and sale, by which the guardian agreed for and in consideration of a sum named by the Company to sell and deliver to the Equitable Life Society the insurance policy of a minor child. The guardian sat in judgment over the rights of the minor. It was to his own personal interest to convert this valuable property of the minor into money, so that he would have the use of it in his lifetime. A contrary judgment would have kept the money from his hands and given the minor child a sum more than three times larger, when the guardian was no longer living to enjoy it.

This was peculiarly a case where that law, enacted for the benefit of minors, should be enforced.

Revised Statutes, State of Mississippi, Sec. 2106: "The court may order a sale of personal property of "a ward, whensoever the interest of such ward will "be promoted thereby, which sale shall be made as "directed by the court."

In an application setting forth that it is for the best interest of the minor (*not the guardian*) that this life insurance policy should be sold in order to realize funds for the education and support of the minor, a faithful Probate Judge summons three or more members of the family to give their advice as to whether the application should be granted.

If no valid reason is given for the sale, the order is refused.

Safeguards around minor's property are too often broken through, and Courts have guarded their rights with a jealous eye.

In the case of Hayes vs. Massachusetts Mutual Life, 18 Northeastern Reporter, page 327 (Illinois), under a law similar to that of the State of Mississippi, it was held that the surrender of a minor's policy by a guardian without authority of Court was null and void, and the release of underwriters for less than the amount due upon the policy was void.

An inspection of the policy sued upon, R. page 6, does not sustain the theory of the defense, that the Company had stipulated with the assured that any

part of the insurance for $10,000 should become payable at the end of the Tontine period. On the contrary, section fifth only stipulates that "the Tontine "dividend when made shall be applied only to the "purchase of an *annuity* to reduce premiums during "the whole subsequent continuance; and that the "first payment of such annuity shall be due at the "commencement of the assurance year of the policy "immediately succeeding the year in which the Ton-"tine dividend period of this policy shall be com-"pleted; provided, that if in any year the amount de-"rived from dividends on this policy shall exceed "the amount of premiums due thereon, the excess "shall be paid in cash to said Samuel H. Snowden or "assigns."

It was evidently contemplated that this policy should be continued after the Tontine period; and any transaction by which the Company released itself from paying $10,000 on the contingency of the death of the insured could only have been by means of a contract of sale made between the two parties. One of the parties, the guardian, being without authority to make it, the sale was a nullity.

The answer of defendant, at page 18 of Record, is that the policy contains a stipulation for the payment of its surrender value whenever demanded by the assured, and a special plea of payment is made.

This defense is not sustained by the contract of

insurance, evidenced by the policy. The Company nowhere binds itself to pay the holder the value of the policy before the death of the assured. The Company, through its agent, Mr. Vancise, page 28 of Record, declares that they are not bound to pay the value of the policy at that date; that the holder of the policy has no right to ask for figures and items, and that they had purchased this policy for a sum named by them.

There is no other defense. It is not set up that the guardian could not pay the premiums any longer, or that the minor was in need of the money for his education and support, or that any of this money paid the guardian was actually expended for the benefit of the minor. Nor is it claimed that the amount paid to the guardian was not tendered back. Nor does defendant claim that the premiums upon the policy, up to the date of the death of the assured, were not paid.

The only plea is payment according to their contract in the policy: and this is not sustained by the policy.

Finally, we respectfully submit that we have shown, the plea in bar of payment, made by defendant should not be sustained: that S. H. Snowden, deceased guardian of the minor, was without authority to make a sale of this insurance policy; that the stipulations contained in the policy do not sustain the ruling of

the lower court, in his charge to the jury, that this was the mere collection of a debt, for which the guardian required no judicial authority, and that we have clearly shown that the verdict of the jury should be set aside and the judgment of the lower court reversed.

Respectfully submitted.

FRANK L. RICHARDSON.

NEW ORLEANS, LA., Nov. 1st, 1893.

Office Supreme Court U. S.
FILED.
OCT 27 1893
JAMES H. McKENNEY,
CLERK.

Case No. 14320

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

Term No. 281.

ROBERT P. MACLAY, TUTOR OF THE MINOR, MASON SNOWDEN,

Plaintiff in Error,

against

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Defendant in Error.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

BRIEF OF DEFENDANT IN ERROR.

CHARLES B. ALEXANDER,
Of Counsel.

JNO. C. RANKIN CO., PRINTERS, 34 CORTLANDT STREET, N. Y.

CASE 14,320.

Supreme Court of the United States.

OCTOBER TERM, 1893.

TERM NO. 281.

ROBERT P. MACLAY, Tutor of the Minor Mason Snowden,
Plaintiff in Error,

against

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,
Defendant in Error.

Defendant's Brief.

This is a writ of error to the Circuit Court of the United States, for the Eastern District of Louisiana.

On July 6th, 1870, the defendant issued a policy on the life of S. H. Snowden, payable to his wife, if living, if not living, to his children or their guardian. The policy was a tontine policy (fol. 9), and the tontine dividend period matured June 1st, 1886. On that date Mason Snowden was the only surviving

child of the wife (then deceased) of S. H. Snowden, and was sole beneficiary under the policy, and entitled to a share, to be apportioned from the surplus and profits derived from lapsed policies, or in other words, to his share of the tontine fund and he was entitled to receive any surrender value of the policy. By the sixth clause of the policy (page 7), it was provided that the policy should have no surrender value in cash or in a paid-up policy (page 7), until the 1st June, 1886. The surrender value of the policy on that date was $3,170.40 (page 22), which was its full value (Record, pages 29 and 30), as it was ascertained by the actuaries, and was arrived at by careful and accurate calculations which covered all the sources of profit, and was correct (page 36). It was the policy's entire share of the assets of the Society (fol. 44).

On the 19th July, 1880, Samuel H. Snowden, father and guardian of the person and estate of Mason Snowden, by an order of the Chancery Court of Wilkinson County, Mississippi, duly qualified, applied to the defendant for the said surrender value, and the full amount was paid him, and that he received and receipted for that sum as guardian, annexing to his receipt the papers of his appointment.

Upon the death of the father, on the 9th March, 1888, R. P. Maclay was appointed tutor in Louisiana of the beneficiary, and sued the defendant for the face of the policy with all tontine dividends, and other profits accrued. The bill of exceptions will be found at fol. 33, and the reasons of the Court at fol. 56.

The record contains the sections of the Revised Code of Mississippi, relating to the sale or compromise of claims due an estate. It also contains the proceedings on the removal of the case from the State Court (fol. 12), the motion papers to remand

(fol. 18). The record also contains the instrument for the appointment of an attorney for the service of process in Louisiana on the defendant and the statute under which such appointment is made.

First Point.

The cause was properly removed to the Circuit Court and the motion to remand was properly denied.

The claim made by the plaintiff in error is that the defendant was at the time of the removal a resident and citizen of the State of Louisiana, in which State the plaintiff resided.

It is not disputed that the plaintiff is a corporation of the State of New York with its principal office there, but the claim is based on the following facts: The defendant, on the 7th of April, 1880, in New York appointed and empowered one Wood of New Orleans, Louisiana, its true and lawful attorney in and for the State of Louisiana, on whom any process of law may be served in any action or proceedings against said company in the State of Louisiana, subject to and in accordance with all the laws of said State, and that any legal service, original, mesne or final on such agent shall be taken and held as valid as if served on the company, and that acknowledgment of service of such process by him, for or on behalf of the company, shall be obligatory on it, and that judgment recovered on such service or acknowledgment shall be conclusive evidence of the indebtedness of the company.

This power was filed in the office of the Secretary of State of Louisiana.

This power was filed under the requirements of an act of said State requiring the filing thereof, and making it irrevocable, so that, as the act says, "at "all times while any liability remains outstanding "there shall be within this State an agent or attor- "ney aforesaid."

The act cited relates only to companies organized under the laws of other States or foreign governments, that is to say, non-residents.

The fact that an insurance company has, in accordance with the statutes of a State, designated a person in the State to receive the service of process, does not cause the company to become a resident of the State within the view of the Removal Act.

By the Removal Act of 1887 (24 *Statutes at large*, p. 552), Sec. 2, it is provided that, under certain conditions, any action brought in a State Court may be removed into a Federal Court "by the defendant or defendants therein being *non-residents* of that State."

In Amsden *vs.* Norwich Union Fire Ins. Co., 44 Fed. Rep., 515 (*Cir. Ct, Ind.*, 1890), it appeared that the defendant corporations had, from time to time, filed with the Auditor of State the statements and instruments required by an Indiana statute "authorizing their agents doing business in the "State to acknowledge service of process for and "on behalf of the companies, and consenting that "service of process upon such agents should be "taken and held to be as valid as if served upon "the company according to the laws of the State."

But it was held that such corporations did not thereby become residents of Indiana, so as to be prevented from removing a cause under the provis-

ions of the Removal Act. The Court says: "There is, I think, no well considered exception to the rule that the residence and citizenship of a corporation must be in the jurisdiction of its creation. It may send its agents into other States to do business, and may consent to be sued there in the State courts, by means of process served upon its agents; but even if so intended, it could not thereby effect a change of residence or citizenship."

See the numerous authorities cited in the above opinion, including:

Nashua & Lowell R. R. Co. *vs.* Boston & Lowell R. R. Co., 136 *U. S.*, 356, where is quoted and applied the doctrine laid down in Railroad Co. *vs.* Wheeler, 1 *Black.*, 297, that a corporation "can have no existence beyond the limits of the State or sovereignty which brings it into life, and endows it with its faculties and powers."

Shaw *vs.* Quincy Mining Co., 145 U. S., 444.:

Held, that the defendant was a Michigan corporation, could not be deemed a resident of New York because in its articles of association it was provided that "the business office of the company hereby constituted and formed shall be in the city, county and State of New York," and another business office "is hereby established at the Quincy "mine, in the county of Houghton and State of "Michigan." This Court carefully reviewed again the authorities and pointed out that they have "always retained the idea that the legal existence "—the home, the domicil, the habitat, the resi- "dence, the citizenship—of the corporation can "only be in the State by which it was created, "although it may do business in other States "whose laws permit it."

This point was passed on in the case of N. E. Mutual Life Ins. Co. *vs.* Woodworth, 111 U. S., 138.

In that case the Insurance Company, though a Massachusetts corporation, had been obliged to execute the same papers as in this case, and appoint an attorney in Illinois. The Court, while holding that the suit could be brought in Illinois, holds that such papers do not prevent a removal of the cause, on the ground of diversity of citizenship, saying "it was exclusively a corporation of Massachusetts, for the purpose of availing itself of the privilege of removing the suit," and that the fact that the company had appointed an attorney does not affect the jurisdiction of the Federal Court.

Second Point.

The guardian of Mason Snowden had a right to receive the surrender value of the policy, and the payment to him discharged the company.

The policy is, by its terms, payable to the child or *his guardian*.

It does not appear that there is anything in the statutes or decisions of Mississippi, bearing directly on the point of the right of a guardian to receive payment of a debt due to his ward. Hence we may assume that the general common law rule prevails, as thus stated in Schouler's *Domestic Relations*, 4th ed., Sec. 342:

"Among the most obvious powers and duties of the guardian in the management of his ward's property are these: To collect all dues and give receipts for the same * * * "

It is claimed that there is something in either Sec. 2201 (2106) of Sec. 2204 (2110) of the Mississippi Code (of 1892) that conflicts with the above-stated conclusion. But it is not apparent how such conflict exists. Section 2201 provides for the sale of the ward's property. Receiving payment of a debt is not a sale. Section 2204 provides that "guardians may be empowered by the Court or Chancellor in vacation to *sell or compromise* claims due their wards." But receiving payment of a debt is neither selling nor compromising a claim, and the fact that the statute requires authority from the Court for a sale or compromise in no way implies that such authority is required for merely receiving payment of a debt.

Thus in Schouler's *Domestic Relations*, it having just been stated, as we have seen, a guardian may collect dues, it is further said (Sec. 343): "A guardian is now generally permitted to submit to arbitration questions and controversies respecting the property and interests of his ward, and the award made in pursuance thereof is binding on all parties. So he may compromise when acting in good faith and sound discretion for the benefit of his ward. Local statutes are found in aid of this right. But on general principle the guardian's compromise of a baseless and unjust claim would not be upheld in equity as against the ward, nor, as it would seem, against the guardian himself, no blame attaching to the latter. An infant cannot in any event be bound by the fraudulent compromise of his guardian; though he would be commonly by a compromise made in good faith and with reasonable prudence. On the same general principles, and with like limitations, the guardian may release a debt due his ward, or cause of action for damages. The same rule as to compounding and releasing debts appears to prevail in England as in this country,

and it applies to all trustees alike. The original doctrine, apart from statute, appears to be this: that he cannot bind his ward by arbitration *unless the Court shall previously authorize him to do so, or subsequently approve, on the ground that it was for the ward's benefit.*" It is added in a note: "Compromise or release under the sanction of the Court having jurisdiction of the guardianship is allowed under some Codes, *and the guardian who obtains it is more amply protected than where he acts on his own responsibility.*"

In *Perry on Trusts*, 4th Ed., Sec. 482, it is said: "A trustee may generally, acting in good faith, release or compound a debt due to his trust estate. But if he releases or compromises a debt without sufficient reason or justification, or if he sells a debt for a grossly inadequate consideration, when by proper diligence more could have been realized, he will be answerable for it in his accounts. In many States there are statutes authorizing executors, administrators, guardians and trustees to refer or compromise all claims due to and from the estates which they represent."

From these statements the policy of the statutes authorizing compromises by guardians is clear. In many cases it must be more or less a matter of doubt whether the circumstances justify a compromise in the particular case. Hence the expediency of a statute enabling the guardian making such compromise to be "more amply protected than where he acts on his own responsibility." But a compromise is throughout recognized as something distinct in nature from merely receiving payment of a debt, and there is no ground for claiming that the statute requiring the sanction of the Court to a *compromise* applies to receiving payment of a debt. Nor is it clear that even a compromise requires the sanction of the Court. It may be said that the

purpose of the statute is to furnish an additional protection to the guardian, to be taken advantage of by him or not, at his option.

There was nothing in the letter (Exhibit D, fol. 44) of the defendant's actuary to show that the payment of the exact amount due found to be correct by defendant's actuaries, and sworn to be correct by defendant's vice-president, was in any sense a compromise on sale.

The word *purchase* is used by the actuary, but the letter must be taken as a whole, and the rest of the letter shows that by purchase he meant payment of the whole share of the company's assets to which the policy holder could be entitled, thus terminating his interest in the policy. What the defendant did was to waive its right to give the policy holder an annuity (fol. 9), and to pay *in cash* the whole and correct value of the policy (fols. 9 and 59). At the date of surrender it is conceded that the policy had a surrender value (fol. 33). The policy had already been entitled to an insurance of $10,000 for sixteen years.

Third Point.

The Policy has Lapsed.

The policy is in consideration of the sum of $67 70 to be paid on the 5th of October, January, April and July in every year, and it was provided that in case of non-payment in every such case the society should not be liable for the payment of the sum assured or any part thereof, and the policy should cease and determine; and in every case where the policy should cease and determine, or

become null and void, the payments thereon shall be forfeited to the society. And it was further provided that surplus or profits derived from policies under the tontine dividend plan, class A, of which this was one, as should cease to be in force before the completion of their respective tontine dividend periods should be apportioned equitably among such policies of the same class as should complete their tontine dividend periods.

The complaint shows that premiums were due and seeks to excuse the omission to pay them by the statement that they could not be paid because of what the plaintiff calls the illegal acts, which consisted in the payment of the surrender value to the guardian of the beneficiary. No premiums have been paid since the 5th October, 1886, and the insured died on the 9th March, 1888.

In Miles *against* The Conn. Mutual Life Insurance Co. (decided January 9th, 1893), 13 Supreme Court Reporter, 275, the policy contained the provisions for forfeiture and lapse similar to this, except that the provisions in the present case are stronger than those in that case. The insured took a paid-up policy upon a forged receipt and release of the beneficiary. The beneficiary, after the forgery had been committed and the surrender value received, paid no other premiums; and this Court held, the late Mr. Justice Blatchford giving the opinion, that there was nothing in the facts to excuse a failure to pay premiums on the policy, or to prevent forfeiture thereof by reason of such non-payment, and that the beneficiary could not recover thereon.

The present case is stronger than the Miles case, in the fact that it appears from the tontine clause above quoted in the present policy that upon the lapse, a right to the profits from such lapse accrues to the tontine class, and was doubtless in this case

divided among the other members of the class, or apportioned to them under the terms of the policy.

The evidence shows no excuse whatever for the failure to pay premiums.

The defendant was not required to take any action to take advantage of the lapse, as the policy became void by its own terms.

Roehner *vs.* Knickerbocker Life Ins. Co., 63 N. Y., 160.

Bosworth *vs.* Western Mutual Aid Society, 75 Iowa, 582.

Ashbrook *vs.* Phœnix Mutual Co., 94 Mo., 72.

Fourth Point.

This is not a case where the plaintiff ever had a right to an accounting.

It is not believed that this question is presented by this record, but as it is alluded to by the Court below in its reasons, the argument is presented as if a bill for an accounting had been filed. The claim that the policy-holder was entitled to an accounting is not raised in the bill of exceptions. If the point is made that by reason of such supposed right existing, the guardian had some duty to perform, which compelled him to apply to the Court for approval of the settlement, the answer is that he had no need of an accounting because he received the entire value of the policy, and this fact is not disputed.

There was no averment in the petition of fraud or mistake or impropriety. The petition simply pleaded the policy and annexed it as part of the

complaint; it was an ordinary tontine policy, and the prayer of the petition was for the amount of the policy with accrued dividends, less any amounts which may be due for premiums, with legal interest.

The testimony was that the amount of surrender value was ascertained by the actuaries and *was correct* (fol. 59). It was the entire share of the company's assets (fol. 44), and was reached by careful and accurate calculations (fol. 46).

It is well settled that the relation of the holder of a tontine policy to a company does not justify him in demanding an account.

It is obvious, and so appears in the record in evidence offered by plaintiff, "That no "company could, without suspending its ordinary "business, give an accounting to each policy "holder of its dealings with his policy. There "are some things in this world which must be "taken on trust, and among these are the divi- "dends declared on life insurance policies. The "proper management of these institutions may "safely be left to competition, which makes it for "the interest of each company to do as well as pos- "sible by its policy holders and to the supervision "of the proper officers of the insurance depart- "ments of the various States, whose sworn duty "it is to see that the companies are solvent, and "fully and equitably carry out their contracts "with their policy holders" (fol. 44).

There are but three grounds on which an accounting could be sought; (*a*), trust relation; (*b*), that the accounting is incidental to other equity relief; (*c*), complication in mutual accounts.

Marvin *vs.* Brooks, 94 N. Y., 80.
Root *vs.* Railway Co., 105 U. S., 189.

There was no trust relation.

The relation to the company of the policy holder is that of creditor, not of a *cestui qué trust.*

Cohen *vs.* Mutual Life Ins. Co., 50 N. Y., 624.

People *vs.* Security Ins. Co., 78 N. Y., 114.

Bogardus *vs.* N. Y. Company, 101 N. Y., 328.

Uhlman *vs.* N. Y. Co., 109 N. Y., 421.

Avery *vs.* Equitable Life Assurance Society, 117 N. Y., 451.

Pierce *vs.* The Equitable Life Assurance Society, 145 Mass., 56.

Grover Baker S. M. Co. *vs.* Clinton, 5 Biss., 324.

Fallon *vs.* Mutual Life, 37 Federal Rep., 164.

And in the absence of fraud, mistake, or impropriety in the accounts, suit will not lie for the accounting. See above citations, and especially,

Uhlman *vs.* N. Y. L. I. Co., 109, N. Y., 421.

The case last cited was the case of a tontine policy whose tontine period had matured and was brought in equity to compel an accounting.

There is nothing sought by the petition to which an accounting could be ancillary.

It is not averred that there are complicated accounts, but even if there were; mere complicated accounts, especially if not mutual, are not the subject of an equity accounting.

Hipp *vs.* Babin, 19 How., 271.
Root *vs.* Ry. Co., 105 U. S., 189.
Ellis *vs.* Davis, 109 U. S., 493.
Moxon *vs.* Bright L. R., 4 Ch. App., 292.

The accounts, where an accounting is ordered, must be mutual,

Phillips *vs.* Phillips, 9 Hare, 471.
Heming *vs.* Pugh, 4 Giffard, 459.
Porter *vs.* Spencer, 2 Johns. Ch., 169.
Durant *vs.* Einstein, 5 Robt., 425.
Salter *vs.* Ham, 31 N. Y., 321.
Lynch *vs.* Willard, 9 Johns. Ch., 342.
Dinwiddie *vs.* Bailey, 6 Vesey, 136.
Fine *vs.* Young, 120 Mass., 507.

In this case it must be borne in mind that the petitioner treated this controversy as the subject of an action at law. He cannot now be heard to claim that his petition was in equity for an accounting (fol. 29), for he went without objection to a jury trial and was defeated. Where there is a legal remedy, equity will not interfere.

Marvin *vs.* Brooks, 94 N. Y., 75.
Root *vs.* R. R. Co., 105 U. S., 189.

And where pleadings come from the State Court, and the parties treat the cause without amendment of them as a suit at law, the Court will assume that equitable remedies are not sought by the plaintiff.

Last Point.

The undisputed evidence is, that the defendant in error, after insuring the policy holder for sixteen years, at the end of that time paid the entire value of the policy to the lawful guardian of the beneficiary and cancelled the policy. Two years later, on a mere technicality, the payment is repudiated, and an unjust attempt is made to revive the policy and collect it again. It is submitted that the plaintiff has made no case and that the writ of error should be dismissed with costs.

C. B. Alexander,
Of Counsel for Defendant in error.